

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

File No. EB-03-PA-029

Pang Cheng, d/b as Best Wok¹

NAL/Acct. No. 200432400001

Westville, New Jersey

FRN: 0009-3455-62

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2005

Released: February 9, 2005

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny a petition for reconsideration filed by Pang Cheng, d/b as Best Wok (“Best Wok”), and we affirm the *Forfeiture Order* issued May 21, 2004, in the amount of ten thousand dollars (\$10,000) for willful violation of Section 301 of the Communications Act of 1934, as amended (“Act”).² At the time of the noted violation Best Wok owned a restaurant located at 1070 Delsea Drive, Westville, New Jersey. The noted violation involves Best Wok’s operation of radio transmitting equipment on the frequency 145.8376 MHz without a license issued by the Commission.

II. BACKGROUND

2. The Enforcement Bureau (“Bureau”) received a complaint alleging that Best Wok was operating radio transmitting equipment on the two meter amateur frequency 145.835 MHz without a license. On October 16, 2001, and January 22, 2003, the Bureau sent Best Wok letters warning that operation of radio transmitting equipment without a license is in violation of Section 301 of the Act and could subject it to penalties. The certified mail return receipts indicate that Best Wok received the warning letters on October 25, 2001, and January 27, 2003, respectively.

3. On February 28, 2003, an agent from the Commission’s Philadelphia, Pennsylvania, field office (“Philadelphia Office”) drove to the Westville, New Jersey, area to determine whether Best Wok was operating radio transmitting equipment without a license. At approximately 10:45 a.m., the agent began monitoring a constant radio signal on or near 145.835 MHz. At 11:10 a.m., the agent used direction finding techniques to determine that the source of the transmissions was the Best Wok restaurant

¹ The *Notice of Apparent Liability for Forfeiture* (“NAL”), NAL/Acct No. 200432400001 (Enf. Bur., Philadelphia Office, released February 26, 2004) and the *Forfeiture Order*, 19 FCC Rcd 8939 (Enf. Bur. 2004), were captioned “Best Wok.” Information submitted with the petition for reconsideration indicates that Best Wok is a sole proprietorship business owned by Pang Cheng. According, we have recaptioned this matter as “Pang Cheng, d/b as Best Wok.”

² 47 U.S.C. § 301.

at 1070 Delsea Drive, Westville, New Jersey.

4. At 11:30 a.m. on February 28, 2003, the agent entered the Best Wok restaurant and inspected the radio transmitting equipment in the presence of the restaurant manager, Mr. Sae C. Hauwo, who admitted that Best Wok was operating a long range cordless telephone system. The system included a base unit at the restaurant and a mobile unit in Mr. Hauwo's vehicle. The agent used frequency-measuring equipment to determine that the base unit was transmitting on 145.8376 MHz. Mr. Hauwo stated that neither Best Wok nor any of its employees had a license to operate the radio transmitting equipment. Additionally, Mr. Hauwo asserted that, when Best Wok received the October 16, 2001, warning letter, it ceased operation of the long range cordless telephone system and purchased another system. Mr. Hauwo stated further that Best Wok resumed operation of the long range cordless telephone system because the other system did not provide sufficient coverage.

5. On February 26, 2004, the Philadelphia Office issued a *NAL* in the amount of \$10,000 to Best Wok for unlicensed operation on 145.8376 MHz. After Best Wok failed to respond to the *NAL*, the Bureau issued Best Wok a *Forfeiture Order* in the amount of \$10,000 for that violation. In its petition for reconsideration, Best Wok requests cancellation or reduction of the forfeiture. Best Wok argues that its violation was unintentional and minor, that it has corrected the violation, that its failure to respond to the *NAL* was unintentional, that it has no prior violations and that Best Wok is now out of business and is unable to pay the forfeiture.

III. DISCUSSION

6. We reject Best Wok's claim that its unlicensed operation was unintentional. Best Wok contends that it purchased its radio apparatus upon the representation that its use in Best Wok's business would be lawful and that it discontinued operation of that radio apparatus when it received the first warning letter from the FCC. Best Wok further claims that "a person or persons unknown" reconnected Best Wok's base station and operated it without Best Wok's knowledge or consent. Best Wok's argument is not credible in light of the FCC agent's determination that the radio apparatus was transmitting from the Best Wok restaurant on February 28, 2003, notwithstanding two prior warnings from Commission staff, and Mr. Hauwo's statement on February 28, 2003, that Best Wok resumed operation of its long range cordless telephone system because its other communications system did not provide sufficient coverage.

7. Best Wok argues its unlicensed operation was a "minor" violation because it did not use its radio apparatus as a two meter amateur station and caused only "minimal" interference to the amateur service. We do not agree. Best Wok's unlicensed operation generated a number of complaints from licensed amateurs that Best Wok was operating its station on two meter frequencies assigned to the amateur service. Furthermore, Best Wok continued its unauthorized operation even after receiving written warnings on October 25, 2001, and January 27, 2003. Any use of amateur service frequencies for business communications creates a great potential for harmful interference to authorized amateur service communications. We must take strong action against such use because failure to do so would only encourage others to engage in the same conduct.

8. No mitigation is warranted on the basis of Best Wok's correction of the violation. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations."³

³ See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVJ, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

9. Best Wok's failure to respond to the *NAL* is not at issue in this proceeding. Therefore, we need not address Best Wok's assertion that its failure to respond to the *NAL* was unintentional.

10. Best Wok asserts that it has no prior violations of the Act. However, we can not find that Best Wok has a history of overall compliance because Best Wok is not a Commission licensee and, therefore, has no history with the Commission upon which a history of overall compliance finding can be based.⁴

11. Best Wok asserts that it is unable to pay the proposed forfeiture. As stated in the *NAL*, the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.⁵ However, the only financial documentation provided by Best Wok is Schedule C (profit and loss statement) from its 2003 federal income tax return. This information is not a sufficient basis on which to assess Best Wok's ability to pay.⁶ Accordingly, in the absence of sufficient information to support a decision to the contrary, we decline to cancel or reduce the proposed forfeiture on the basis of inability to pay.

12. We have considered the forfeiture amount and we have examined Best Wok's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,⁷ and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,⁸ as well. As a result of our review, we conclude that Best Wok willfully violated Section 301 of the Act and find that neither cancellation nor reduction of the monetary forfeiture is appropriate.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act⁹ and Section 1.106 of the Rules,¹⁰ Best Wok's petition for reconsideration of the *Forfeiture Order* **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the

⁴ See *Timothy J. Massett*, 19 FCC Rcd 9258 (Enf. Bur. 2004) and *Odino Joseph*, 18 FCC Rcd 16522 (Enf. Bur. 2003).

⁵ *NAL* at para. 13.

⁶ The Commission has long recognized that gross revenues are the primary indicator of ability to pay a forfeiture. See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992) (finding that gross receipts are a "very useful yardstick" in analyzing a company's financial condition for forfeiture purposes). In order to determine Best Wok's ability to pay from its income tax returns, we need its complete tax returns from the most recent three year period. It is not sufficient to provide only Schedule C because that schedule includes only revenues from Best Wok's restaurant business and not any other income or revenues of Best Wok, including income or revenues of Mr. Cheng.

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁹ 47 U.S.C. § 405.

¹⁰ 47 C.F.R. § 1.106.

Act.¹¹ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹²

15. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Pang Cheng, d/b as Best Wok., 1070 Delsea Drive, Westville, New Jersey 08093, and to its counsel, Neil I. Sternstein, Esq., Five Aberdeen Place, Woodbury, New Jersey 08096.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹¹ 47 U.S.C. § 504(a).

¹² See 47 C.F.R. § 1.1914.